

1 FY 2013 AGREEMENT TO FUND ECONOMIC DEVELOPMENT PROGRAMS
2 OPERATED BY DOWNTOWN DURHAM, INC. USING CITY OF DURHAM
3 GRANT FUNDS
4

5 This contract is made and entered into as of the _____ day of
6 _____, 20_____, by the City of Durham ("City") and Downtown
7 Durham, Inc. ("Grantee"), a 501(c) (6) not-for-profit corporation organized and existing
8 under the laws of North Carolina.
9

10 Sec. 1. Background and Purpose. It is the intent of this contract to mirror the scope of
11 services provided by Downtown Durham, Inc. under its earlier Non-City-Agency contract
12 while defining expected goals and deliverables.
13

14 Sec. 2. Grantee Warranties and Representations. Term of Agreement and Annual
15 Submittals.

16 (a) During the term of this Agreement, the Grantee warrants, represents, and
17 covenants that all information provided or submitted to the City regarding the proposed
18 use of all the monies being granted by the City to the Grantee pursuant to this Agreement
19 (hereinafter, "City Funds") for described programs shall be accurate and true.

20 (b) The Grantee represents that it is an organization described by Section
21 501(c)(6) of the Internal Revenue Code and that it has provided the City with a valid, un-
22 revoked letter from the Internal Revenue Service that it is such an organization.

23 (c) The term of this Agreement shall be 1 year(s) ("Term") according to the
24 City's fiscal calendar, beginning with July 1, 2012 to June 30, 2013.

25 (d) To be eligible for the City Funds, Grantee shall deliver its program scope and
26 description according to Attachment 1 ("Program Scope and Description 2012/2013").
27 Grantee shall document quarterly deliverables according to Attachment 2 ("DDI
28 Quarterly Deliverable Report Form FY2013") which attachments are made a part of this
29 Agreement, and references in this instrument to "this Agreement" include those
30 attachments, unless the context requires otherwise. In case of conflict, this agreement
31 form shall control the attachments.
32

33 Sec. 3. Services; Uses of Funds.

34 (a) The Grantee affirmatively represents that it shall provide the program of
35 services set forth in Attachment 1 during the subject fiscal year. By the end of the subject
36 fiscal year, and before entering into an amendment for following fiscal year, the Grantee
37 shall use the City Funds paid to it by the City pursuant to this Agreement exclusively in
38 the category of the programs identified in Attachment 1. The maximum amount to be
39 paid by the City under this Agreement shall be based upon the City Funds available for
40 the subject fiscal year. The available funding amount for fiscal year 2013 is \$148,048.00
41

42 (b) (i) The Grantee shall include the City of Durham's name and/or logo in
43 all communications produced between during the Term of this Agreement in which the
44 Grantee identifies any person or entity as being a sponsor of, or donor or contributor to,
45 Grantee. The style of presentation (text and/or logo, font size, etc.) shall be determined
46 by the Grantee. It is generally expected that when another person or entity is identified in

the communication as a sponsor, donor, or contributor, and that person's or entity's logo appears in the communication, the City's logo would also appear. When the style of presentation is based on the amount of financial support provided, the City of Durham's name and/or logo shall be treated equally with other supporters providing similar financial support, and shall be based on the total amount of City funds received and to be received pursuant to this Agreement by the Grantee.

(ii) In performing its obligations under subsection (i), the Grantee must obtain the permission of the City before including the City's name or logo in any communication that is:

- required to include the name or logo pursuant to subsection (i), or
- produced during the time period specified in subsection (i) if the communication identifies the City as a sponsor, donor, or contributor.

Permission may be granted by the City's OEWD. If the City denies permission to place the City's name and logo in a particular communication, this subsection (b) shall not apply to that particular communication, and nothing in this section (b) shall prevent Grantee from sending that communication out.

Sec. 4. Deadline for Performance. The Grantee shall comply, by June 30 of the year during the Term of the Agreement, with all of the requirements imposed on it by this Agreement, except to the extent, if any, that this Agreement indicates a different time for performance.

Sec. 5. Reporting Requirements.

(a) The Grantee, at the Grantee's sole expense, shall account for all City Funds received from the City under this Agreement and all expenditures made from City Funds. The Grantee shall submit a report of program activities and accomplishments associated with the expenditure of City Funds to the City's Office of Economic and Workforce Development (the "Implementing Department"). That report shall be submitted quarterly according to Attachment 2, "DDI Quarterly Deliverables Report Form FY 2013" and shall The report shall be in such form and detail as the Implementing Department may require. If necessary, the Department may require additional detailed information (in addition to the required report), including but not limited to accounts, records, budget-to-actual statements, and other supporting documentation. Without limiting the preceding sentence, it is agreed that, if requested in writing by the City, the Grantee shall make all of that information available for inspection and audit by the City at any time during the workday of the Implementing Department or such other department of the City that the City Manager specifies in writing to the Grantee. If the City Funds are \$30,000 or more, the Grantee shall comply with section 5(b) and not with section 5(c). If the City Funds are under \$30,000, the Grantee shall comply with either section 5(b) or section 5(c).

(b) Upon request of the City, the Grantee, at the Grantee's sole expense, shall obtain an audit of its financial statements. The audit shall be performed by a Certified Public Accountant or a Certified Public Accounting firm. This audit shall be conducted in accordance with generally accepted auditing standards, and the financial statements shall be prepared in conformity with generally accepted accounting principles. The Grantee shall see that the City's Director of Audit Services receives the audit report within six months after the close of the Grantee's fiscal year.

(c) The Grantee, at the Grantee's sole expense, shall prepare a certified and sworn statement and a schedule of Grantee receipts and expenditures (cash basis) in a format prescribed by the City. The Grantee shall see that the City's Director of Audit Services receives the statement and schedule within six months after the close of the Grantee's fiscal year.

Sec. 6. Payment. The City shall make payments to the Grantee as provided herein after the start of the fiscal year and within 30 days after approval and execution of this Agreement. The City shall pay the Grantee as follows: An amount not to exceed \$148,048, to be paid in equal quarterly increments after receipt of a completed Attachment 2, "DDI Quarterly Deliverables Report Form FY 2013" for the quarter for which the Grantee is invoicing. The City shall not be obligated to pay the Grantee any payments, fees, expenses, or compensation other than those authorized by this section. Such payment schedule may be amended by written consent of the City and Grantee. The Director of the Implementing Department (the "Director") shall have authority to give that consent on behalf of the City. The City, in its sole discretion, and without affecting its other rights and remedies, may delay or cancel any or all of those payments for failure by the Grantee to comply with any of the provisions of this Agreement, including deadlines for submitting any accounting, audit, statement, information, record, documentation, or report. The Director shall have the authority to decide whether the Grantee has complied with this Agreement, including the attachments. That determination shall include the authority to construe vague and/or ambiguous requirements, if any. That determination, unless it is unreasonable, shall be binding on the Grantee. Unless the City otherwise specifies, if the withholding is designated to be a delay of payment instead of a cancellation of payment, the payment so delayed shall be made when the Grantee has submitted the missing items, provided that such items are received by the City within 45 days after the date that they were due. If any of said missing items is not received by the City before the expiration of the additional 45-day period, then the amounts so withheld shall not be paid to the Grantee even if the missing items are later received by the City. If the City does not delay or cancel in one instance, the City shall still have the right to delay or cancel after any other instance of failure by the Grantee. In this section 6 ("Payment"), "include" in its various forms means include without limitation.

Sec. 7. Insurance. Reference Attachment 4, "Insurance Requirements" which is made a part of this contract.

Sec. 8. Attachments. The following attachments are made a part of this contract:
Attachment 1 "Program Scope and Description 2012/2013" containing 2 pages;
Attachment 2 "DDI Quarterly Deliverables Report Form FY 2013" containing 1 page;

In case of conflict between an attachment and the text of this contract excluding the attachment, the text of this contract shall control.

Sec. 9. Notice. (a) All notices and other communications required or permitted by this contract shall be in writing and shall be given either by personal delivery, fax, or certified United States mail, return receipt requested, addressed as follows:

To the City:
Director
Office of Economic and Workforce Development
City of Durham
302 East Pettigrew Street, Suite 190
Durham, NC 27701
The fax number is (919) 560-4986

To the Grantee:
President
Downtown Durham, Inc.
15 Market Street, Suite 213
Durham, NC 27701
The fax number is (919) 682-1980

(b) Change of Address. Date Notice Deemed Given. A change of address, fax number, or person to receive notice may be made by either party by notice given to the other party. Any notice or other communication under this contract shall be deemed given at the time of actual delivery, if it is personally delivered or sent by fax. If the notice or other communication is sent by United States mail, it shall be deemed given upon the third calendar day following the day on which such notice or other communication is deposited with the United States Postal Service or upon actual delivery, whichever first occurs.

Sec. 10. Indemnification. (a) To the maximum extent allowed by law, the Grantee shall defend, indemnify, and save harmless Indemnitees from and against all Charges that arise in any manner from, in connection with, or out of this contract as a result of acts or omissions of the Grantee or subcontractors or anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable. In performing its duties under this subsection "a," the Grantee shall at its sole expense defend Indemnitees with legal counsel reasonably acceptable to City. (b) Definitions. As used in subsections "a" above and "c" below -- "Charges" means claims, judgments, costs, damages, losses, demands, liabilities, duties, obligations, fines, penalties, royalties, settlements, and expenses (included without limitation within "Charges" are (1) interest and reasonable attorneys' fees assessed as part of any such item, and (2) amounts for alleged violations of sedimentation pollution, erosion control, pollution, or other environmental laws, regulations, ordinances, rules, or orders -- including but not limited to any such alleged violation that arises out of the handling, transportation, deposit, or delivery of the items that are the subject of this contract). "Indemnitees" means City and its officers, officials, independent contractors, agents, and employees, excluding the Grantee. (c) Other Provisions Separate. Nothing in this section shall affect any warranties in favor of the City that are otherwise provided in or arise out of this contract. This section is in addition

to and shall be construed separately from any other indemnification provisions that may be in this contract. (d) Survival. This section shall remain in force despite termination of this contract (whether by expiration of the term or otherwise) and termination of the services of the Grantee under this contract. (e) Limitations of the Grantee's Obligation. If this section is in, or is in connection with, a contract relative to the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating connected therewith, then subsection "a" above shall not require the Grantee to indemnify or hold harmless Indemnitees against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence, in whole or in part, of Indemnitees.

Sec. 11. Termination. The City, in its discretion and for its convenience, may terminate this Agreement at any time by giving written notice of termination to the Grantee. If termination is for convenience and not due to a breach of contract by the Grantee, then the City shall pay to the Grantee a share of the City Funds to reflect the services performed and authorized expenditures incurred, if any, by the Grantee in accordance with this Agreement prior to such termination. The Director shall have the authority to decide the appropriate amount to be paid pursuant to the preceding sentence, and that determination, unless it is unreasonable, shall be binding on the Grantee.

Sec. 12. Repayment of Funds. The Grantee shall repay to the City the full amount of any City Funds lost, misapplied, unaccounted for, or inadequately accounted for in violation of this Agreement.

Sec. 13. Miscellaneous

(a) Choice of Law and Forum. This contract shall be deemed made in Durham County, North Carolina. This contract shall be governed by and construed in accordance with the law of North Carolina. The exclusive forum and venue for all actions arising out of this contract shall be the North Carolina General Court of Justice, in Durham County. Such actions shall neither be commenced in nor removed to federal court. This subsection (a) shall not apply to subsequent actions to enforce a judgment entered in actions heard pursuant to this section.

(b) Waiver. No action or failure to act by the City shall constitute a waiver of any of its rights or remedies that arise out of this contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing.

(c) Performance of Government Functions. Nothing contained in this contract shall be deemed or construed so as to in any way estop, limit, or impair the City from exercising or performing any regulatory, policing, legislative, governmental, or other powers or functions.

(d) Severability. If any provision of this contract shall be unenforceable, the remainder of this contract shall be enforceable to the extent permitted by law.

(e) Assignment. Successors and Assigns. Without the City's written consent, the Grantee shall not assign (which includes to delegate) any of its rights (including the right to payment) or duties that arise out of this contract. The City Manager may consent to an

assignment without action by the City Council. Unless the City otherwise agrees in writing, the Grantee and all assignees shall be subject to all of the City's defenses and shall be liable for all of the Grantee's duties that arise out of this contract and all of the City's claims that arise out of this contract. Without granting the Grantee the right to assign, it is agreed that the duties of the Grantee that arise out of this contract shall be binding upon it and its heirs, personal representatives, successors, and assigns.

(f) Compliance with Law. In carrying out any services or activities funded in whole or part under this Agreement, the Grantee shall comply with all applicable federal, state, and local laws, regulations, and ordinances.

(g) City Policy. THE CITY OPPOSES DISCRIMINATION ON THE BASIS OF RACE AND SEX AND URGES ALL OF ITS CONTRACTORS TO PROVIDE A FAIR OPPORTUNITY FOR MINORITIES AND WOMEN TO PARTICIPATE IN THEIR WORK FORCE AND AS SUBCONTRACTORS AND VENDORS UNDER CITY CONTRACTS.

(h) EEO Provisions. During the performance of this Contract the Grantee agrees as follows: (1) The Grantee shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin, political affiliation or belief, age, or handicap. The Grantee shall take affirmative action to insure that applicants are employed and that employees are treated equally during employment, without regard to race, color, religion, sex, national origin, political affiliation or belief, age, or handicap. Such action shall include but not be limited to the following: employment, upgrading, demotion, transfer, recruitment or advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. The Grantee shall post in conspicuous places, available to employees and applicants for employment, notices setting forth these EEO provisions. (2) The Grantee shall in all solicitations or advertisement for employees placed by or on behalf of the Grantee, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, national origin, political affiliation or belief, age, or handicap. (3) The Grantee shall send a copy of the EEO provisions to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding. (4) In the event of the Grantee's noncompliance with these EEO provisions, the City may cancel, terminate, or suspend this contract, in whole or in part, and the City may declare the Grantee ineligible for further City contracts. (5) Unless exempted by the City Council of the City of Durham, the Grantee shall include these EEO provisions in every purchase order for goods to be used in performing this contract and in every subcontract related to this contract so that these EEO provisions will be binding upon such subcontractors and vendors.

(i) SDBE. The Grantee shall comply with all applicable provisions of Article III of Chapter 18 of the Durham City Code (Equal Business Opportunity Program), as amended from time to time. The failure of the Grantee to comply with Article III of Chapter 18 shall be a material breach of contract which may result in the rescission or termination of this contract and/or other appropriate remedies in accordance with the provisions of Article III of Chapter 18, this contract, and State law. The Participation Plan submitted in accordance with that chapter is binding on the Grantee. Section 18-59(f) of Article III of Chapter 18 provides, in part, "If the City Manager determines that the Contractor has

failed to comply with the provisions of the Contract, the City Manager shall notify the Contractor in writing of the deficiencies. The Contractor shall have 14 days, or such time as specified in the Contract, to cure the deficiencies or establish that there are no deficiencies.” It is stipulated and agreed that those two quoted sentences apply only to the Grantee’s alleged violations of its obligations under Article III of Chapter 18 and not to the Grantee’s alleged violations of other obligations.

(j) No Third Party Rights Created. This contract is intended for the benefit of the City and the Grantee and not any other person.

(k) Principles of Interpretation and Definitions. In this contract, unless the context requires otherwise: (1) The singular includes the plural and the plural the singular. The pronouns “it” and “its” include the masculine and feminine. References to statutes or regulations include all statutory or regulatory provisions consolidating, amending, or replacing the statute or regulation. References to contracts and agreements shall be deemed to include all amendments to them. The words “include,” “including,” etc. mean include, including, etc. without limitation. (2) References to a “Section” or “section” shall mean a section of this contract. (3) “Contract” and “Agreement,” whether or not capitalized, refer to this instrument. (4) Titles of sections, paragraphs, and articles are for convenience only, and shall not be construed to affect the meaning of this contract. (5) “Duties” includes obligations. (6) The word “person” includes natural persons, firms, companies, associations, partnerships, trusts, corporations, governmental agencies and units, and other legal entities. (7) The word “shall” is mandatory. (8) The word “day” means calendar day.

(l) Modifications. Entire Agreement. A modification of this contract is not valid unless signed by both parties and otherwise in accordance with requirements of law. Further, a modification is not enforceable against the City unless the City Manager or a deputy or assistant City Manager signs it for the City. This contract contains the entire agreement between the parties pertaining to the subject matter of this contract. With respect to that subject matter, there are no promises, agreements, conditions, inducements, warranties, or understandings, written or oral, expressed or implied, between the parties, other than as set forth or referenced in this contract.

(m) City’s Manager’s Authority. To the extent, if any, the City has the power to suspend or terminate this contract or the Grantee’s obligations under this contract, that power may be exercised by the City Manager or a deputy or assistant City Manager without City Council action.

IN WITNESS WHEREOF, the City and the Grantee have caused this contract to be
executed under seal themselves or by their respective duly authorized agents or officers.

By the CITY OF DURHAM:

By: _____

Preaudit Certification

By DOWNTOWN DURHAM, INC.

By: _____

Title of officer: _____

(Affix corporate seal.)

State of _____ ACKNOWLEDGMENT BY
County of _____ DOWNTOWN DURHAM, INC.

I, a notary public in and for the aforesaid county and state, certify that
_____ personally appeared
before me this day and stated that he or she is (strike through the inapplicable:)
chairperson/ president/ chief executive officer/ vice-president/ assistant vice-president/
treasurer/ chief financial officer of DOWNTOWN DURHAM, INC., a corporation, and
that by authority duly given and as the act of the corporation, he or she signed the
foregoing contract or agreement with the City of Durham and the corporate seal was
affixed thereto. This the _____ day of _____, 20____.

Notary Public

My commission expires: